No. 22691

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

E. ARTHUR BARROWS, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA, APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

# BRIEF FOR THE UNITED STATES, APPELLEE

CLYDE O. MARTZ,
Assistant Attorney General.

WM. MATTHEW BYRNE, JR.,
United States Attorney,
Los Angeles, California 90012.

ERNESTINE TOLIN,
Assistant United States Attorney,
Los Angeles, California 90012.

ROGER P. MARQUIS,
ROBERT S. LYNCH,
Attorneys, Department of Justice,
Washington, D. C. 20530.

# INDEX



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## OPINION BELOW

The district court did not enter an opinion.

## JURISDICTION

This is an appeal from an order entered on December 7, 1967, granting a temporary injunction conditionally restraining the appellants from damaging the surface lands and property in question pending the administrative determination of the validity of the appellants' mining claim. Appellants were allowed by the order to continue to operate the claim and remove dirt, sand, gravel and other surface materials "as are normally replenished seasonally." The jurisdiction of the district court was invoked by the United States under 28 U.S.C. sec. 1345. Notice of appeal was filed January 8, 1968. The jurisdiction of this Court rests on 28 U.S.C. sec. 1292(1), authorizing interlocutory appeal from orders granting injunctions.

## ISSUE PRESENTED

Whether the district court properly issued an injunctio preventing permanent alteration of a tract of public domain pending final disposition of an administrative proceeding to determine the validity of that claim.

## STATEMENT

This action was instituted by the United States with the filing of a complaint on June 8, 1967, seeking damages for trespass and conversion and an injunction prohibiting further operation of a sand and gravel plant on appellants' mining claim in the San Bernardino National Forest, California. After oral argument, an injunction was denied on September 1, 1967. Thereafter, the United States moved for a restraining order. Subsequent to further oral argument, an order granting a restraining order was issued by the court on October 19, 1967 (R. 264). Thereafter, the court, on December 7, 1967, entered a temporary injunction (R. 310), from which appeal was taken by the Barrows, et al., on January 8, 1968 (R. 314). Upon application by the United States, the injunction was modified on April 10, 1968. Appellants sought a stay pending appeal from this Court but it was denied by order of May 7, 1968.

The undisputed facts show that, in 1953, appellants, E. Arthur Barrows and Esther Barrows, posted and filed a location notice, later amended, whereby they purported to locate

a mining claim for sand and gravel in Grout Creek, a seasonal stream emptying into Big Bear Lake in the San Bernardino National Forest (R. 306, 308). In 1960, the Barrows leased the claim to appellant Seaman and Big Bear Rock and Materials Company, who have since conducted a sand and gravel operation, together with the other named appellants, claiming through the lessees (R. 307). In 1964, the Forest Service contested the validity of the claim for lack of timely discovery of a valuable mineral deposit prior to July 23, 1955, the effective date of the Common Varieties Act, 30 U.S.C. sec. 611. That Act precluded any further location of claims for certain common varieties of minerals, including sand and gravel. On March 14, 1966, in Contest No. 04879, the Hearing Examiner declared the mining claim to be null and void for lack of a timely discovery of a valuable mineral deposit (R. 307). A timely appeal of the decision was taken by appellants and is now in the process of determination before the Director of the Bureau of Land Management.

Pending final adjudication of the validity of appellants' mining claim, the United States applied to the district court for injunctive and other relief. After extensive proceedings, the district court found irreparable injury to the interests of the United States (R. 308) and concluded that a temporary injunction should issue subject to a condition (R. 309).

Appellants were allowed to continue to operate the claim pending administrative determination of the validity of the claim, on the condition that they would remove no more than "such amounts of sand, gravel and surface materials from the subject area as are normally replenished seasonally" (R. 310-311).[1/] Appellants then appealed.

In March 1968, the United States moved to cite appellants for contempt for violation of the temporary injunction. After hearing, the district court determined that the injunction was not sufficiently specific to hold appellants in contempt and that intention to violate the injunction was not shown and denied the motion. At the suggestion of the court, the United States then applied for a modification of the injunction. On April 10, 1968, the district court modified the injunction to provide that appellants be allowed to continue to operate, on the condition that they remove only so much material in any given year as is seasonally deposited that year. Procedures for yearly calculation of the allowable level of excavation were specified.

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1/ It appears that the district court derived the terms of the condition from the position the appellants had consistently maintained, i.e., that the United States would suffer no irreparable injury due to the operating of the claim because the excavations would be filled in by seasonal depositing during each year. Such representations are found in appellants' Answer (R. 63), Affidavit of Barrows (R. 75), Affidavit of Home (R. 107) Counter Memorandum (R. 111), Proposed Findings (R. 145), Second Affidavit of Barrows (R. 200-202), and Objections to Government Proposed Findings and Conclusions (R. 279-281).

## ARGUMENT

### THE DISTRICT COURT PROPERLY ISSUED THE TEMPORARY INJUNCTION PENDING ADMINISTRATIVE DETERMINATION OF THE VALIDITY OF THE MINING CLAIM

A. The district court had jurisdiction to consider the question of interim relief pending administrative action. - Jurisdiction over this case was invoked under 28 U.S.C. sec. 1345. The district court concluded that, while jurisdiction to determine the validity of the claim rested in the Department of the Interior, the court was not deprived of jurisdiction to maintain the status quo during the pendency of administrative proceedings (R. 308). Such decision was plainly correct.

There is, of course, no question of the right of the United States to bring a suit as plaintiff in the district court, nor is there any question of personal jurisdiction over the defendants. The only possible problem is the possible exclusion of trial court jurisdiction because of the subject matter of the case. The land, of course, is admittedly owned by the United States, and private title thereto can be created only pursuant to act of Congress, in the present posture only by a patent issued by the Secretary of the Interior. It is thus clear that the court has no jurisdiction to adjudicate title to the property.

On the other hand, it has long been settled under the mining laws that the courts have authority to adjudicate rights to possession of public domain founded on mining locations. Archer v. Greenville Gravel Co., 233 U.S. 60, 65 (1914); Erhardt v. Boaro, 113 U.S. 537, 539 (1885). And as to public lands, the courts have always been open to private litigants to determine possessory rights. Gauthier v. Morrison, 232 U.S. 452, 461 (1914). In that connection, the courts may adjudicate the validity of the mining location, even though that adjudication will not bind the Secretary of the Interior in later determining the validity of a patent application. Perego v. Dodge, 163 U.S. 161, 168 (1896). And when administrative proceedings are pending as to title, "The jurisdiction of the state court to rule upon the question of right of possession is not withdrawn * * *." Bowen v. Chemi-Cote Perlite Corporation, 102 Ariz. 423, 432 P.2d 435, 443 (1967).[2/] In Northern Pac. Ry. Co. v. McComas, 250 U.S. 387, 392 (1919), the Court summarized the situation as follows:

> The situation then at the time the case was heard in the trial court was this: The railroad company had neither the legal nor the equitable title to four of the tracts. Instead, the full title was in the United States and all existing claims to them arising under the land grants and other public land laws were pending in the Land Department, whose officers

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2/ Of course, this equally applies to federal courts where appropriate federal jurisdiction exists over a possessory dispute.

> were specially charged by law with their examination and determination and with the disposal of the title accordingly. It is settled that in such a situation the courts may not take up the adjudication of the pending claims, but must await the decision of the land officers and the issue of patents in regular course. Michigan Land & Lumber Co. v. Rust, 168 U.S. 589, 592-594; Brown v. Hitchcock, 173 U.S. 473; Cosmos Exploration Co. v. Gray Eagle Oil Co., 190 U.S. 301, 315; Humbird v. Avery, 195 U.S. 480, 502. There is, however, a related jurisdiction which the courts may exercise pending the final action of those officers; they may protect a possession lawfully acquired or restore one wrongfully interrupted, for that is a matter which is not confided to the Land Department and may be dealt with by the courts in the exercise of their general powers. Gauthier v. Morrison, 232 U.S. 452, 461.

It is also well settled that generally the United States as a property owner is in no worse position than other property owners. This Court has recognized the right of the United States to bring appropriate action where the defendant claims possessory rights under the mining or other laws. "In general, the courts are open to the United States, and no statute closes them to it in matters of public land other than transfer of title." United States v. Schultz, 31 F.2d 764 (N.D. Cal. 1929). And the United States has been granted an injunction by the court to prevent harm to federal lands pending administrative action. In Kennedy v. United States, 119 F.2d 564, 565 (C.A. 9, 1941), this Court quoted with approval

from the Schultz opinion in enjoining Kennedy from grazing cattle on federal land pending action by the United States to designate the lands to be included in a grazing district under the Taylor Grazing Act.

The distinction between possessory actions and the determination of validity of unpatented mining claims was recognized in Best v. Humboldt Mining Co., 371 U.S. 334 (1963), when Mr. Justice Douglas wrote (at 340):

> Institution of suit is one way to obtain immediate possession; and we see nothing incompatible between the use of that means to obtain possession and the use of the administrative proceedings to determine title.

Whereas in that case the United States obtained possession by instituting a condemnation action, here it seeks only regulation of claimants' possessory interest. The proper forum for such request must be the district court. The Department of the Interior has no police power to regulate use of a claim pending the outcome of the administrative determination of the validity thereof. Gauthier v. Morrison, 232 U.S. 452, 461 (1914) The oft-cited plenary powers of the Department pertain only to the validity question. The United States is powerless to protect the interests of the people in this situation unless it has recourse to the courts to prevent irreparable harm to its own lands. Moreover, in the instant case, while not final, the decision of the Hearing Examiner at least raises grave questions as to validity of the claims.

B. The district court properly issued a temporary injunction under the circumstances of this case. - Rule 65, F.R.Civ.P., gives the district courts the power to enjoin or restrain a party to a controversy pending its final outcome. And the courts exercise considerable discretion regarding such relief. Yakus v. United States, 321 U.S. 414, 440 (1944); International Manufacturing Co. v. Landon, Inc., 327 F.2d 824, 825 (C.A. 9, 1964); Tanner Motor Livery, Ltd. v. Avis, Inc., 316 F.2d 804, 809 (C.A. 9, 1963). Further, the courts will avoid inconvenience and injury as far as possible by attaching conditions to the award. Yakus v. United States, supra, 321 U.S. at 440.

Injunctive relief is generally available to the United States where irreparable injury will be done to its lands. Light v. United States, 220 U.S. 523, 537 (1911); In re Debs, 158 U.S. 564, 588-593 (1895); United States v. Petersen, 91 F.Supp. 209, 213 (S.D. Cal. 1950), aff'd 191 F.2d 154, cert. den. 342 U.S. 885. It follows therefore that the district court could also grant temporary injunctive relief in matters concerning federal lands where it had obtained jurisdiction.[3/]

The injunction itself is reasonable in its terms. Appellants consistently maintained that each year seasonal floods would deposit as much material as they would remove in their

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3/ See: Note, Interim Injunctive Relief Pending Administrative Determination, 49 Columbia L. Rev. 1124.

sand and gravel operation (R. 63, 75, 107, 111, 145, 200-202, 279-281). The district court intended that the operation of the claim be limited only in this aspect, that mining be confined to actual seasonal replenishment and thereby irreparable injury to the United States would be prevented. If the appellants' representations were true, they would suffer no hardship under such a condition. The order of the court was couched in their terms and they should not now be heard to complain thereon.

## CONCLUSION

For the foregoing reasons, the order appealed from should be affirmed.

Respectfully submitted,

CLYDE O. MARTZ,
Assistant Attorney General.

WM. MATTHEW BYRNE, JR.,
United States Attorney,
Los Angeles, California 90012.

ERNESTINE TOLIN,
Assistant United States Attorney,
Los Angeles, California 90012.

ROGER P. MARQUIS,
ROBERT S. LYNCH,
Attorneys, Department of Justice,
Washington, D. C. 20530.

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